Fall 2011

An Evolving Foreclosure Landscape: The Ibanez Case and Beyond

Peter Pitegoff

Laura S. Underkuffler

An Evolving Foreclosure Landscape: The *Ibanez* Case and Beyond

Peter Pitegoff[*] and Laura Underkuffler[**]

I. INTRODUCTION

Mortgage securitization, subprime lending, a persistently weak housing market, and an explosion of residential mortgage defaults—today's homeowners and banks face a new and challenging landscape. Recently, courts in several states have issued decisions that alter the terrain for mortgage foreclosures. In Massachusetts, New Jersey, and New York, among other states, courts have dismissed foreclosure actions on the basis of what might seem to be highly technical deficiencies in the pleading or proof. The most well-known—and controversial—in this cluster of cases is *U.S. Bank National Ass'n v. Ibanez,*[1] decided by the Supreme Judicial Court of Massachusetts this year. In *Ibanez,* the court held that two assignee banks failed to obtain legal title to foreclosed properties because they failed to prove that they held valid assignments of the foreclosed mortgages at the moment that the foreclosure proceedings were begun.

The apparent attitude of the courts in these cases can be best summarized by the statement of a New York judge in a comparable context: that courts will not be mere "automatons mindlessly processing paper motions in mortgage foreclosure actions[,] most of which proceed on default."[2] Rather, in these cases, courts have held banks, other lenders, and securitized trusts to strict proof of what might otherwise seem to be fairly inferred facts and contractual obligations.

Are these decisions best seen as misguided attempts to temporarily save homeowners (and others) from the pain of foreclosure actions—delays that waste judicial and litigants' time—when we consider that these foreclosures will, in any event, eventually occur? Or are they justified decisions which establish substantive norms that the real conditions of real estate financing in the twenty-first century demand?

In this Issue Brief, we maintain that the decisions in these cases are not extreme examples of judicial hyper-technicality run amok. Rather, they are attempts to address the radically new foreclosure realities in the age of mortgage securitization and subprime lending—realities that existing laws, on many levels, are inadequate to address.

II. THE CASES IN QUESTION: *IBANEZ* AND OTHERS

The *Ibanez* case was actually two cases, consolidated for hearing. Both dealt with foreclosure actions against homeowners whose mortgages were securitized, prior to foreclosure, through a series of complicated transactions.

---

[*] Dean and Professor, University of Maine School of Law.

[**] J. DuPratt White Professor of Law, Cornell University Law School. This Issue Brief was first released by ACS in October 2011.

[1] 941 N.E.2d 40 (Mass. 2011).

[2] M&T Mortg. Corp. v. Foy, 858 N.Y.S.2d 567, 572 (N.Y. Sup. Ct. 2008).

In the first case, Antonio Ibanez borrowed $103,500 for the purchase of a home in Springfield, Massachusetts. The lender was Rose Mortgage, and the loan was secured by a mortgage which listed Ibanez as the mortgagor and Rose as the mortgagee. The mortgage was recorded with the local registry of deeds.[3]

Several days later, Rose executed an assignment of this mortgage in blank—that is, with no specification of the party to whom it would be transferred. At some point, the name "Option One Mortgage Corporation" was stamped in the blank space, as the assignee. This assignment was recorded. After the stamping, but before recording, Option One executed an assignment of the mortgage in blank. According to U.S. Bank, the mortgage was eventually assigned to: Lehman Brothers Bank, FSB; then to Lehman Brothers Holdings Inc.; then to Structured Asset Securities Corporation; and, ultimately pooled with approximately 1,220 other mortgage loans and assigned to U.S. Bank as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z. This transaction effectively converted the mortgages into mortgage-backed securities that were sold to investors (a process known as securitization).[4]

On July 5, 2007, U.S. Bank foreclosed on the Ibanez property through a statutorily granted power of sale. Under Massachusetts law, a mortgage holder does not have to obtain judicial authorization to foreclose on a mortgaged property, if the power to foreclose is granted by the mortgage itself.[5] The entity holding the mortgage need only publish notice of intent to foreclose and send notice by registered mail to the property owner of record. At the foreclosure sale, U.S. Bank purchased the Ibanez property for itself. The purchase price was significantly less than the amount of the outstanding debt and the estimated market value of the property.[6]

In September, 2008—more than a year later—U.S. Bank brought an action in court to quiet title to the Ibanez property. In particular, U.S. Bank sought a declaration that any right, title, or interest of the mortgagor (Ibanez) had been extinguished by the foreclosure sale, and that title was vested in the Bank.[7]

The case that was consolidated with *Ibanez* for hearing followed a similar pattern. In that case, Mark and Tammy LaRace gave a mortgage for property in Springfield, Massachusetts to Option One Mortgage Corporation on May 19, 2005. The mortgage was security for a $103,200 loan. The mortgage was recorded in the local registry of deeds on that day. One week later, Option One executed an assignment of the LaRace mortgage in blank. It was later claimed that the mortgage was assigned to Bank of America on July 28, 2005, as part of a flow sale and servicing agreement. Bank of America was later claimed to have assigned it to Asset Backed Funding Corporation (ABFC) in an October 1, 2005 mortgage loan purchase agreement. ABFC later pooled the mortgage with others and assigned it to Wells Fargo as trustee for the group of now securitized mortgages.[8]

On July 5, 2007, Wells Fargo foreclosed on the LaRace mortgage, using the same statutory power of sale as used in the *Ibanez* case. At the foreclosure sale, Wells Fargo

---

3 *Ibanez*, 941 N.E.2d at 45-46.

4 *See id*. at 46.

5 *See id*. at 49; MASS. GEN. LAWS ch. 244, § 14 (2011).

6 *See Ibanez*, 941 N.E.2d at 44, 47.

7 *See id*. at 44.

8 *See id*. at 47-48.

purchased the LaRace property for itself. The purchase price was more than the outstanding debt, but significantly less than the property's estimated market value.[9]

In October of 2008—more than year after the foreclosure sale—Wells Fargo brought a quiet title action, requesting a court declaration that any right, title, or interest that the LaRaces had in the property was extinguished, and a declaration that title was vested in Wells Fargo.[10]

In both cases, the mortgagors—Ibanez and the LaRaces—did not initially answer the complaints in the quiet title actions, and U.S. Bank and Wells Fargo moved for entry of default judgments against them. At a case management conference, a judge of the Massachusetts Land Court raised the issue of whether U.S. Bank and Wells Fargo were entitled to foreclose on the properties in view of the fact that the assignments of the mortgages to them were not executed or recorded until *after* the foreclosure complaints were filed and the foreclosure sales were held.[11] In other words, although U.S. Bank and Wells Fargo represented in the notices for the foreclosure sales that they were the mortgage holders, they—in truth—had not yet been assigned the mortgages. The assignment to U.S. Bank was executed more than one year after the foreclosure sale in the case of the Ibanez property, and the assignment to Wells Fargo was executed ten months after the foreclosure sale, in the LaRace case. (The court found that this was true, even though the La Race assignment to Wells Fargo declared a date that preceded the foreclosure sale.) The explanation for this state of affairs in both cases was that "the use of postsale assignments was customary in the industry."[12]

The legal question, thus, was whether an entity which claimed that it was the legal holder of a mortgage at the time of foreclosure, but—in fact—could not prove that it was, could foreclose because the mortgage was proven to have been *later* assigned to it. The appellate court held that it could not. Stressing the power that the statutory scheme grants to mortgage holders—*i.e.*, the power to foreclose without judicial oversight—the court held that "one who sells under a power [of sale] must follow strictly its terms".[13] The court noted that "[o]ne of the terms of the power of sale . . . is the restriction on who is entitled to foreclose."[14] Only a party who is a present legal holder of a mortgage, or his agent, may exercise the power of sale. "Any effort to foreclose by a party lacking 'jurisdiction and authority' to carry out a foreclosure under these statutes is void."[15]

For U.S. Bank and Wells Fargo "to obtain the judicial declaration of clear title that they [sought] . . . they had to prove their authority to foreclose under the power of sale and show their compliance with the requirements on which this authority rests."[16] Having failed to do so, they failed to demonstrate that they acquired good title to the properties.[17]

What is not apparent from this bare-bones narrative is the state of the real estate paperwork in these cases. In the *Ibanez* case, among other facts, the assignment of the mortgage to U.S. Bank was claimed to have occurred pursuant to a trust agreement,

---

9 *See id*. at 44, 48.

10 *See id*. at 44.

11 *See id*.

12 *See id*. at 45, 49, 54.

13 *See id*. at 49-50 (quoting Moore v. Dick, 72 N.E. 967 (Mass. 1905)).

14 *See id*. at 50.

15 *Id*.

16 *Id*. at 51.

17 *See id*. at 55.

which was not in the record. A 273-page private placement memorandum (offering mortgage-backed securities to potential investors) was produced, but U.S. Bank could not produce any mortgage schedule identifying the Ibanez loan among the mortgages included. In addition, U.S. Bank never furnished any evidence that the entity allegedly assigning the mortgage to U.S. Bank—the Structured Asset Securities Corporation—ever held the mortgage.[18] In the *LaRace* case, there was no document in the record reflecting an assignment of the LaRace mortgage by Option One, the original entity, to Bank of America. There was an unexecuted copy of a mortgage loan purchase agreement, which purported to transfer the pooled mortgages from Bank of America to ABFC. However, although the agreement makes reference to a schedule listing the assigned mortgage loans, that schedule was not a part of the trial court record. Wells Fargo submitted a schedule that it represented to identify the assigned loans, but it contained no property addresses, names of mortgagors, or any number that corresponded to the loan number or servicing number of the LaRace property.[19]

Two concurring justices wrote of the "utter carelessness with which the plaintiff banks documented the titles to their assets."[20] The justices did not call into question the fact that the mortgagors of the properties in question had defaulted on their obligations. However, the justices expressed that prior to commencing a foreclosure action:

> the holder of an assigned mortgage needs to . . . ensure that his legal paperwork is in order. Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massachusetts law has always required that it proceed strictly in accord with the statutes that govern it.

The justices noted that this is particularly true in a state such as Massachusetts, which permits foreclosure without judicial supervision.[21]

A second case of this type, *Bank of New York v. Raftogianis*,[22] was decided by the Superior Court of New Jersey last year. The Bank of New York brought an action to foreclose on a mortgage taken out by Michael Raftogianis and Roman Krywopusk, who had borrowed $1,380,000 from American Home Acceptance, with the debt memorialized by a note and mortgage executed on September 30, 2004. The mortgage described the "Lender" as American Home Acceptance. There was also mention of the Mortgage Electronic Registration System ("MERS"), which is a private corporation which administers a national electronic registry of mortgage interests and servicing rights in mortgage loans.[23] In the mortgage, MERS was described as "a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns."[24] The mortgage was recorded with the county clerk on October 20, 2004.[25]

---

[18] *See id*. at 46-47, 52.

[19] *See id*. at 48, 52.

[20] *See id*. at 55-56 (Cordy, J., concurring, with whom Batsford, J., joined).

[21] *See id*.

[22] 13 A.3d 435 (N.J. Super. Ct. Ch. Div. 2010).

[23] *See id*. at 442, 440.

[24] *Id*. at 442.

[25] *See id*.

American Home Mortgage subsequently sold its interests in a group of mortgage loans to American Home Mortgage Securities, LLC. The Mortgage Loan Purchase Agreement that effectuated this transaction contemplated an additional transfer of these mortgage loans to the American Home Mortgage Investment Trust 2004-4 Mortgage Backed Notes, Series 2004-4. The court found that the note and mortgage were securitized without notice to the borrowers.[26]

The court's description of this transaction, and the documents that accomplished it, presents a picture of complexity that makes the foreclosure process essentially inaccessible to many mortgagors. The description also suggests confusion and lax procedures operating to the detriment of mortgagors.

> In or about December 2004, a group of mortgage loans held by American Home Acceptance were securitized. While the court is now satisfied that defendant's loan was among that group . . . , that was not at all clear from the documents initially submitted by plaintiff . . . . The securitization of the loan was not referenced in the [foreclosure] complaint, or even in plaintiff's initial motion for summary judgment. (Judges and lawyers who regularly handle foreclosure litigation would probably recognize that the matter involved a loan which had been securitized just from the description of plaintiff in the complaint, such as "The Bank of New York as Trustee for American Mortgage Investment Trust 2004-4 Mortgage Backed Notes, Series 2004-4." There is no apparent reason, however, why a layperson not familiar with the securitization process would recognize that.) . . .
>
> The documents provided in this case are typical of those presented in other matters involving the securitization of mortgage loans. Those documents are lengthy, complex, and difficult to understand. Included in the materials ultimately provided was a Mortgage Loan Purchase Agreement, an Amended and Restated Trust Agreement, an Indenture, and a Servicing Agreement. (The Indenture in this case is in excess of 100 pages, without attachments. An attachment which simply defines the terms used in the Indenture itself contains fifty-five pages.) . . . The transfers or assignments of the underlying mortgage loans involve other complexities.[27]

Raftogianis and Krywopusk defaulted on the mortgage in October, 2008. The complaint to foreclose was filed on February 9, 2009. The complaint stated that the Bank of New York became owner of the note and mortgage "before the . . . complaint was drafted." The complaint did not refer to the securitization of the loan, any of the entities involved in the securitization process, or any transfer from either American Home Acceptance or MERS. The complaint also provided no information as to who was then in physical possession of the note. Krywopusk filed an answer, counterclaim,

---

[26] *See id*. at 443, 437.

[27] *See id*. at 443.

and cross claim on May 6, 2009.[28] *After* the complaint to foreclose was filed, an "Assignment of Mortgage" was executed from MERS to the Bank of New York, as Trustee. The assignment referred to the mortgage securing the Raftogianis/Krywopusk note.[29]

The Bank of New York moved for summary judgment in January, 2010. "The motion was based on a certification from plaintiff's counsel providing copies of the note, the mortgage, and the February 2009 [post-complaint] assignment."[30] The subsequent struggle to determine the rudimentary facts of the chain of transactions was described by the court:

> Defendant filed written opposition, challenging the validity of the MERS assignment. Plaintiff responded with a certification executed by a supervisor for American Home Mortgage Servicing Inc., the servicer for the loan. While that . . . recited that the note and mortgage had previously been sold to plaintiff, it did that in conclusory terms. No additional documentation was provided. Neither plaintiff's motion nor plaintiff's reply to defendant's opposition addressed the securitization of the debt, or the transfer or negotiation of the underlying note. The court then required the production of the documents executed as a part of the securitization process. The motion was adjourned.[31]

The court's subsequent frustration with Bank of New York's inability to document the relevant transactions continued, amidst a flurry of document production and conflicting claims about the possibility of producing relevant documentation. In the end, the Bank of New York never established that it had possession of the Raftogianis/Krywopusk note as of the date that the foreclosure action was filed.[32]

Since physical possession of the note was required (under New Jersey law) to commence a foreclosure action, the court held that the Bank of New York failed to establish that it had the right to initiate the action. It further held that establishment of later possession could not retroactively rectify the situation. The court emphasized that "[t]he date of filing can affect substantive rights, and those involved should have the ability to confirm that filing was proper."[33] For instance, under New Jersey law, "a debtor's right to cure a default with respect to a residential mortgage, without being responsible for the lender's fees and costs, will end when the complaint is filed. . . . Similarly, . . . [New Jersey law] provides that certain borrowers facing foreclosure have the right to a six month forbearance, effective with the filing of a foreclosure complaint."[34]

The court held that "[p]laintiff was required to establish one basic fact—that as of the time the complaint was filed, it or its agent did have possession of the note on which the action was based."[35] The burden of proof on this issue rested with the Bank

---

[28] *See id*. at 442, 445.

[29] *See id*. at 445.

[30] *See id*.

[31] *See id*. at 445-46.

[32] *See id*. at 452.

[33] *See id*.

[34] *Id*.

[35] *Id*. at 459.

of New York. Having failed in its proof, the foreclosure complaint was dismissed without prejudice. Any new complaint would have to be accompanied by a certification confirming that the Bank of New York was then in physical possession of the original Raftogianis/Krywopusk note.[36]

In a later case, *Wells Fargo Bank v. Ford*,[37] the Superior Court of New Jersey ruled against a purported assignee of a mortgage on similar facts. In that case, Sandra Ford borrowed $403,750 from Argent Mortgage Company and gave a mortgage on her residence in Westwood, New Jersey, to secure the loan. Five days later, Argent purportedly assigned the mortgage and note to Wells Fargo Bank. When Ford allegedly stopped making payments about one year later, Wells Fargo brought a court action to foreclose on the property. Ford, appearing *pro se*, responded that Argent committed predatory and fraudulent acts in connection with the loan and mortgage, and that the assignment to Wells Fargo was invalid.[38]

Wells Fargo subsequently brought a motion for summary judgment. Ford filed a cross motion for summary judgment, alleging that documents produced by Wells Fargo in the litigation were forgeries, and that she had been overcharged more than $20,000 in closing costs at the time of closing.[39]

The Superior Court held that Wells Fargo failed to establish its standing to pursue the foreclosure action. Under New Jersey law, "'[a]s a general proposition, a party seeking to foreclose a mortgage must own or control the underlying debt.'"[40] In this case, Wells Fargo could produce no endorsement of the Ford note by Argent to Wells Fargo. In addition, there was no certification by a Wells Fargo officer that, on the basis of personal knowledge, Wells Fargo was the holder and owner of the note. A purported assignment of the mortgage which was produced "was not authenticated in any manner; it was simply attached to a reply brief."[41] Absent such proof, Wells Fargo could not foreclose.

The final case in this cluster was decided by the Supreme Court of New York last year. In this case, *Deutsche Bank National Trust Co. v. McRae*,[42] Terry McRae borrowed $45,000 from First Franklin, a Division of National City Bank of Indiana, in July, 2006. This debt was memorialized by a note and was secured by a mortgage on McRae's real property in Almond, New York.[43]

McRae allegedly defaulted on the loan and Deutsche Bank commenced a foreclosure action on January 21, 2009. Deutsche Bank made an application for an order of reference, which was denied by the Supreme Court. The ground cited was Deutsche Bank's "fail[ure] to submit evidence of the proper assignment or delivery of the Mortgage and/or Note."[44]

---

36 *See id*.

37 15 A.3d 327 (N.J. Super. Ct. App. Div. 2011).

38 *See id*. at 328.

39 *See id*.

40 *See id*. at 329 (quoting *Raftogianis*, 13 A.3d 435).

41 *See id*. at 331.

42 894 N.Y.S.2d 720 (N.Y. Sup. Ct. 2010).

43 *See id*. at 720.

44 *See McRae,* 894 N.Y.S.2d. at 721. *See also* N.Y. Real Prop. Law § 1321 (Consol. 1963) (allowing plaintiff to request an Order of Reference in the event that a defaulting borrower does not file an appearance within the time allotted, which sends the foreclosure case to a referee to determine the full amount owed by the borrower, if the property can be sold as one parcel, etc.).

The court described how, under New York law, a plaintiff in a foreclosure action "must establish the existence of the mortgage and mortgage note, ownership of the mortgage, and the defendant's default in payment . . . ."[45] "A mortgage can be assigned in two ways—by the delivery of the bond and mortgage . . . to the assignee with the intention that all ownership interests [are] thereby transferred, or by a written instrument of assignment."[46] Neither was demonstrated in this case. There was no proof offered that Deutsche Bank held the note and mortgage when the action was commenced. In the alternative, the written assignment on which Deutsche Bank relied was defective. Although the assignment purportedly assigned the mortgage, it did not assign the underlying obligation. When the court indicated that this situation was insufficient, Deutsche Bank submitted a new copy of the note, "which for the first time contained an endorsement by First Franklin . . . to First Franklin Financial Corporation, and an endorsement in blank by First Franklin Financial Corporation." However, this endorsement in blank was undated. "In stark contrast," the court wrote, "the copy of the Note attached to the complaint bears no such endorsements. Obviously, the endorsements were made in response [to the court's order] . . . , which post-date the commencement of this case . . . , and are ineffective" to ground the filing of the action.[47]

In dismissing the case, the court explained the policy reasons for its action:

> [t]oday, with multiple (and often unrecorded) assignments of mortgage obligations and multiple securitizations often related to the same debt, the courts should carefully scrutinize the status of parties who claim the right to enforce these mortgage obligations. For the unrepresented homeowner, the issues of standing and real party in interest status of the foreclosing party are never considered. Without such scrutiny, there is a risk that the courts will give the judicial 'seal of approval' to foreclosures against unrepresented homeowners who have little, if any, understanding of these issues, much less the legal significance [of them] . . . .[48]

III. POINTLESS PROCEDURAL HURDLES OR THE PROTECTION OF SUBSTANTIVE RIGHTS?

Before assessing the desirability of the *Ibanez* decision and the others like it, we posit several preliminary points. First, in none of these decisions were the foundational legal principles on which they turned anything surprising or new. In each case, the court simply applied long established principles—such as the idea that a foreclosing party must have a present legal right to do so—in reaching the decision that it reached. In no area of the law can a party bring an action, claiming breach of a contract under which it has no present legal rights. Requiring that claimed mortgage assignees or securitization trustees must actually possess the mortgage interests that they assert is simply the implementation of a routine legal principle.

Second, the fact that traditional legal rules support a particular result does not, of course, mean that those rules cannot be altered in particular contexts by courts. That

[45] *Id*. at 722.

[46] *Id*.

[47] *Id*. at 723 (emphasis deleted).

[48] *Id*. at 724.

is, essentially, what the foreclosing parties in these cases requested. Although decades of law might require—on its face—the dismissals of these actions, the foreclosing parties argued that the complexities of mortgage securitization and multiple assignments in blank require flexibility in the enforcement of what are essentially hyper-technicalities in this context. The law in these states might require that the foreclosing party have a written assignment or actual, physical possession of the mortgage or indebtedness note. However, there was no real dispute in any of these cases that the foreclosing parties were—with the exception of some missing paperwork—the parties who were entitled to do so.

Finally, there was no evidence in any of these cases that the property owners had not, in fact, defaulted. In all of these cases, the property owners implicitly conceded that they had stopped making payments, often for substantial periods. If there was unfairness in the bringing of these foreclosure actions, it was not rooted in the factual question of default.

Indeed, one could argue, all that was accomplished in these cases was a temporary delay of the inevitable. In each of these cases, the complaint was dismissed by the court without prejudice, meaning that the case could be re-filed. The foreclosing parties could simply cure the technical defect—obtain the written assignment or find the missing documents—and file for foreclosure again.

Are there—therefore—any valid reasons for the decisions in these cases?

There are, in fact, several important principles that these decisions embody—principles that are critical to the law in this area, and broader questions of public policy.

A. A HOME MORTGAGE DEALS WITH SHELTER; AS A RESULT, IT IS A PARTICULAR KIND OF CONTRACT THAT IS IMBUED WITH PARTICULARLY IMPORTANT SOCIAL ISSUES AND IMPERATIVES.

In the *Ibanez* case and at least one other,[49] the mortgages that were threatened with foreclosure were on the debtors' homes. The individual and societal importance of individuals' homes has always been recognized in American law and policy. It is recognized in bankruptcy laws, income tax laws, property tax rates, federal mortgage lending standards, and a myriad of other contexts. In the *Ibanez* case, the court explicitly recognized this factor. It stressed that the securitization of mortgages does not justify carelessness in foreclosure procedures; those mortgages still convey "legal title to someone's home or farm, and must be treated as such."[50] In the *McRae* case, the court cited mortgage reform legislation in New York in support of its decision. This legislation stated, explicitly, that "'it is the expressed policy of the state to preserve and guard . . . the social as well as the economic value of home ownership.'"[51]

The foreclosure crisis of the past three years has certainly intensified awareness of the importance of fairness in residential loans, and the individual and societal costs of loss of home ownership. However, the underlying principle–of the importance of human shelter–has long informed our nation's public policy, and the law's treatment of foreclosure.

---

49 *See Ibanez*, 941 N.E.2d at 46, 47, 52; Ford, 15 A.3d at 328.

50 *Ibanez*, 941 N.E.2d at 51-52.

51 *McRae*, 894 N.Y.S.2d at 721 (quoting N.Y. Real Prop. Law § 265-a(1)(b) (Consol. 2007)).

B. IN FORECLOSURE ACTIONS–PARTICULARLY THOSE THAT INVOLVE MULTIPLE ASSIGNMENTS AND SECURITIZED LOANS–THE BURDEN OF PROOF REGARDING THE RIGHT TO FORECLOSURE MUST BE PLACED ON THE FORECLOSING PARTY.

The *Ibanez* and similar cases discussed here all illustrate two basic truths: (1) complex real estate transactions with multiple (and often undocumented) assignments and the securitization of thousands of mortgages are beyond the assumed understanding of any layperson; and (2) as a result, proof of these transactions, and the claimed right to foreclose, must lie with the foreclosing party.

The complexities of the transactions involved in this cluster of cases, and the seeming attitude (of the financial institutions involved) that property owners need not be made aware of them, are not unique; they are currently rife throughout the industry. During the past decade, when mortgage lending became a scramble for quick profits by loan originators who had no intention of holding and servicing loans, documentation of the millions of assignments and securitizations involved has been by-and-large abysmal. The problems that were present in these cases–missing documents, assignments in blank, unrecorded assignments, post-transaction documentation, and others–have been discovered in foreclosure challenges in many states, and have been the subject of many critical court opinions.

With such rampant problems, the approach that was taken in *Ibanez* and the other cases is the only one that is sensible: the burden of proving the right to foreclose must be placed on the foreclosing party. If a remote assignee or securitization trustee claims the right to foreclose, *it must prove* the legal basis for that claim. It cannot be the case that a remote party can claim the right to foreclose, with the property owner then forced to *disprove* its entitlement to that action. All of the documents and other knowledge of complex transactions are (to the extent that they exist) in the possession of the foreclosing party. As a result, as a practical matter–as well as a matter of fairness–the burden of proving the right to foreclose must be borne by the foreclosing party.

Granting the property owner an entitlement to proof of the transactions involved is, of course, only as good as his ability to enforce it. This leads to the third important principle in this context:

C. IN CASES INVOLVING MULTIPLE ASSIGNMENTS AND/OR SECURITIZED LOANS, JUDICIAL OVERSIGHT OF THE FORECLOSURE PROCESS IS CRITICAL.

In mortgage foreclosure cases involving multiple assignments and securitized loans, a property owner who receives notice of foreclosure from a remote third party or securitization trustee is placed in an impossible situation. Is this party, from whom notice is received, the one actually (legally) entitled to foreclose? If not, and the foreclosure proceeds, the property owner might well remain liable (under the terms of the loan) to the legally entitled party. With whom should the property owner deal, in raising defenses or seeking modification of loan terms under state or federal mandatory mediation or foreclosure protection programs?

To ensure answers to such questions, and to implement mandatory mediation laws, judicial oversight of the foreclosure process is critical. For instance, in response to the foreclosure crisis, several states have enacted statutes that mandate negotiations between property owners and mortgage holders in an attempt to avert foreclosure. In New York, a new statute requires that a court hold a mandatory conference before foreclosure on high-cost or sub-prime home loans, with the purpose being “to allow the parties to reach agreement on an alternative to foreclosure."[52] In Maine, recent legislation has created the Foreclosure Mediation Program, which provides a defaulting borrower with the opportunity to enter into negotiations with the lender, supervised by a trained and impartial mediator, in which loss-mitigation strategies and the possibility of avoiding the foreclosure action are discussed.[53]

Attempts by property owners to negotiate settlements and avoid foreclosure have been stymied repeatedly by the claims of remote third parties and loan servicers who claim that they have no authority to negotiate. To force production of proof of the right to foreclose, and to require good faith participation by lenders in negotiation, judicial oversight is critical. In addition, the obligation to invoke judicial oversight of the foreclosure process should rest with the foreclosing party. The property owner, with generally little information and less expertise, should not be in the position of having to hire a lawyer to stop the foreclosure process and invoke the court's protection. If a remote assignee or securitization trustee desires to foreclose, it should be required to file a court action to do so.

The logic behind this principle is obvious in those jurisdictions that require judicial supervision and approval of all foreclosure actions. However, it is not traditionally a part of the law in those jurisdictions that do not require a claimed mortgage holder to submit to the judicial process. In the approximately 29 "non-judicial foreclosure" states, a mortgage holder is empowered to proceed to foreclosure and sale if the mortgage grants the lender that power. Since "non-judicial sale" is a mortgage term that homeowners are very unlikely to appreciate, or feel that they can negotiate, it is safe to assume that most mortgage loans in those states grant lenders that power. Indeed, in the cases of the Ibanez and LaRace loans, the properties were foreclosed and sold prior to any judicial involvement. Judicial scrutiny of the foreclosures in those cases occurred only because—*months* after the sale—the purported mortgage holders chose to initiate quiet title actions. Had they not done so, it is highly unlikely that proof of the right to foreclose, required by the *Ibanez* court, would ever have been required.[54]

"Non-judicial foreclosure" statutes are based on the assumption that mortgage foreclosures are relatively simple affairs between two contracting parties, with relatively simple facts about payment. This might have described most residential mortgage transactions twenty years ago. However, in the world of real estate financing in the twenty-first century, this model reflects none of the realities of most transactions. To give claimed mortgage holders the right to foreclose and sell the properties—unless homeowners can *guess* that the foreclosing party is unauthorized, and *know* that they

---

[52] *See McRae*, 894 N.Y.S.2d at 249 (discussing N.Y. C.P.L.R. § 3408 (Consol. 2008)).

[53] *See* 14 Me. Rev. Stat. tit. 14, § 6321-A, 6322 (2009). Pursuant to Maine's Foreclosure Mediation Program, if the borrower chooses to initiate the mediation process, no judgment authorizing the foreclosure and sale of the property can be entered until the mediator's report is completed and filed with the court. If the parties are unable to come to come to terms with a strategy to avoid further proceedings during mediation, the ensuing mediator's report reflects that an agreement could not be reached and the court may then enter a judgment of foreclosure in favor of the lender. Similar legislation has been enacted in several other states. *See, e.g.*, N.Y. C.P.L.R. § 3408 (Consol. 2008); Mass. Gen. Laws ch. 244, § 35A (2008); N.J. Stat. Ann. § 46:10B-50 (2009).

[54] In Massachusetts, a solution has been sought for at least one subset of loans, sub-prime loans. The Massachusetts Attorney General and Massachusetts courts have attempted to force pre-sale negotiation in the case of sub-prime loans for individual homes, by labeling them "presumptively unfair" and the product of deceptive trade practices in violation of general consumer protection statutes. *See* Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548 (Mass. 2008).

have the right to negotiation, *and* can afford to hire an attorney to file in court—is unrealistic in today's world and represents poor public policy.

Naysayers will point out that long foreclosure delays characterize the current situation in some states which require judicially approved foreclosures. Because of the spiraling number of defaults on mortgage loans in the past three years, delays in accomplishing foreclosures in New Jersey and New York, for instance, now exceed an average of three years.[55] This has, in turn, depressed prices for the sales of non-distressed properties and created blocks of blight in some cities.[56] Judicial review of foreclosures is, however, only part of the problem; other causes include the disorganization of assignment and securitization records, and uncertainty about foreclosure rules on both the state and federal levels.[57] In addition, disputes about responsibility for deteriorating homes in the process of foreclosure mirrors problems in the foreclosure process itself. In Los Angeles, the City has sued Deutsche Bank, "one of the country's largest trustees of mortgage-backed securities, seek[ing] hundreds of millions of dollars in penalties." The Bank is accused of "illegally forcing out tenants, allowing others to live in deplorable conditions and letting scores of empty homes devolve into havens for gang members, squatters and drug dealers." The Bank's defense? The City has sued the wrong party. "Loan servicers, not Deutsche, which is the trustee for the properties, are responsible for the maintenance of the properties, said [a Deutsche] spokesman . . . ."[58]

There are potential costs to any course of action. The question is whether the efficiency of non-judicial foreclosures in moving foreclosed properties justifies the costs that come with rapid, non-supervised foreclosure powers exercised by alleged third-party assignees and securitization trustees. The better answer is that it does not.

IV. CONCLUSION

Neither *Ibanez*, nor any of the other cases discussed here, forbids mortgage securitization, multiple mortgage and note assignments, or other complex real estate financing transactions. Indeed, the *Ibanez* court itself stressed that a securitization trustee could be shown as a proper assignee if there is a trust agreement which clearly and specifically identifies the mortgage at issue as among those assigned to the trust.[59] The issue is not the blanket forbidding of complex transactions; it is the protection of all rights, including those of the property owner, when default and foreclosure are claimed.

---

[55] *See, e.g.*, Julie Schmit, *Housing Market Recovery Could Be Stalled: Researcher Cites Foreclosure Delays, Which Give Troubled Borrowers Prolonged Time in Homes*, USA TODAY, July 14, 2011, at 2A.

[56] *See id.*; *see also* Brady Dennis, *There Goes the Foreclosed-on Neighborhood*, THE PORTLAND PRESS HERALD, July 1, 2011, at A2.

[57] *See* Schmit, *supra* note 55.

[58] *See* Dennis, *supra* note 56.

[59] *See Ibanez*, 941 N.E.2d at 53.